1966

Mildred N. Cornwell v. Ray H. Barton : Appellant's Brief

IN THE SUPREME COURT OF THE STATE OF UTAH

MILDRED N. CORNWELL,
Plaintiff and Appellant,

vs.

RAY H. BARTON,
Defendant and Respondent.

No. 10557

APPELLANT'S BRIEF

Appeal from Judgment of the Third District Court for Salt Lake County
Honorable Merrill C. Faux, Judge

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PRELIMINARY STATEMENT

The parties will be referred to as in the court below.

STATEMENT OF THE KIND OF CASE

This is an action brought by plaintiff for personal injuries received when plaintiff slipped and fell on a common walkway through apartments owned and operated by defendant, the plaintiff being a guest of one of the tenants.

DISPOSITION IN THE LOWER COURT

The case was tried to the court sitting with a jury. From a finding of no negligence and judgment for defendant, plaintiff appeals.

RELIEF SOUGHT ON APPEAL

Plaintiff seeks reversal of the judgment entered on the verdict and an order granting plaintiff a new trial.

STATEMENT OF FACTS

Plaintiff filed the complaint against defendant for injuries received when she slipped and fell while using a common walkway through an apartment house complex owned and operated by him, while staying at said apartment as a guest of her mother, on the 5th day of February, 1964. Plaintiff's mother was living in an apartment at the address of 2014 View Street. (See Exhibit 2-P). In order to proceed from this apartment to 21st South Street, a person would walk from 2014 due south on a walkway between two triplexes being numbered 1321, 1323, and 1325 on the west and 1331, 1333, and 1335 on the east. (Exhibit 2-P). Plaintiff slipped and fell on the walkway opposite 1335 as shown by a mark made by plaintiff on Exhibit 2-P (R. 107).

Plaintiff testified that between 12:30 and 1:00 P.M. she left the apartment of her mother and proceeded south on the walkway. At that time there was a

light covering of snow over the entire walkway. Plaintiff did not feel that there was enough snow to warrant overshoes. The temperature was freezing. (R. 89). Plaintiff did not observe any footprints on the walkway, she being apparently the first person to walk on said walkway following the snowfall. (R. 90). Plaintiff testified that she arose between 8:00 and 9:00 A.M. that morning; that the weather conditions outside were called to her attention by a telephone call from her brother-in-law, Pierce Brady, and that she observed that there was a medium snowfall occurring. She made the observation of the snowfall shortly after arising. (R. 88). Plaintiff further testified that she left the apartment of her mother shortly after lunch. She noticed while they were eating lunch that the sun had come out, and she decided to leave for her shopping expedition to Sugar House. (R. 88). Plaintiff proceeded out of the apartment, down the steps, and south along the walkway to the place in question. She was wearing walking shoes. (R. 89). At the point in question her feet suddenly went out from under her, and she fell onto her back and head. (R. 90). After the fall, plaintiff observed that she had slipped on a sheet of ice which was concealed by the thin covering of snow. She described the ice as being V-shaped and going across the sidewalk from east to west; that it tapered off a bit toward the west; that it was approximately 2 feet at its widest part and tapered smaller going west. (R. 91). Plaintiff had not noticed any ice in this vicinity prior to the fall. (R. 105).

Mrs. Florence Davis testified for defendant. She and her husband were the caretakers for Dr. Barton. She testified that she was called to the scene after Mrs. Cornwell had fallen, and that she observed the spot where she fell. She described the ice at this place as having the shape of an oval, about 2 feet long. (R. 162). She testified that she had been in the area the day before and had observed that the walks were dry and clear. (R. 163). She testified that she and her husband had the responsibility of keeping the walks free of ice and snow and had been furnished with shovels, cement broom, and rock salt; that it had been their practice to scrape ice and to use salt to keep them free of ice. (R. 161-163). Mrs. Davis testified that on the day in question she had been away from the apartments from approximately 9:30 A.M. to somewhere between 11:30 and noon; that the walks were dry when she left and when she came home there had been a light snowfall; that after arriving home she fixed lunch for herself and her daughter; that they had lunch; and that she then received a telephone call just after she had started sweeping the snow. She testified that the time was between 1:00 and 1:30 P.M. (R. 160-162).

On cross examination Mrs. Davis admitted that she did not actually proceed down the walk in question but had walked past the area to the north on her way to the garbage cans the day before, during the forenoon and the afternoon, and that she had not observed any ice on the walks; but if she had, she would have put salt on said places. (R. 164). Mrs. Davis further testi-

fied that she and Mr. Davis had two grown daughters living at home who helped with the duties of maintaining the walks; that a 24-year-old daughter was at home during the morning in question. (R. 165). She further testified that they were careful to observe occasions when there was melting and freezing occurring with resulting patches of ice on the walks, and that when ice appeared, they would use rock salt. Mrs. Davis testified that she observed the skid marks of Mrs. Cornwell's heels and that she then swept off the snow in that area and placed salt on the ice. (R. 167).

Mr. Davis testified that he performed the services of a custodian for Dr. Barton for a consideration, (R. 153) and that Dr. Barton had furnished him with the necessary equipment to perform these services, including snow shovels and rock salt; that whenever it would snow, he or one of the members of his family would go out and shovel the snow or sweep the walks; that whenever the temperature would warm up so as to cause snow to melt and then freeze into patches of ice on the walks, they would take rock salt and sprinkle the same on the ice. He testified that he recognized ice on the walks would constitute a hazard to the tenants. Mr. Davis testified that salt was not placed on the walks the day before the accident; that if he had seen a patch of ice the day before, salt would have been used. (R. 154-155). Mr. Davis testified that there were elderly people and particularly elderly ladies living in the apartment house complex, particularly Mrs. Buck, Mrs. Davidson at 2014, an elderly lady at 1337, Mrs. Watson

on the top of the east of the sixplex, Mrs. Yates at the top of 2014, and Mrs. Cornwell's mother at 2014. (R. 155-157).

The records from the United States Weather Bureau show that there was one inch of snow on the ground on February 3 and 4, 1964, and that intermittent snow or light snow flurries began on February 5, 1964, at 8:32 A.M. and continued intermittently until 12:05 P.M.; that a snow depth of 2 inches of snow was on the ground at 5:00 P.M. February 5, 1964; that temperatures were above freezing for about one and one half hours on February 4, 1964; and that temperatures were below freezing all of February 5, 1964. (Exhibit 4-P).

The hourly temperature readings on Exhibit 8-P for February 3, 1964, show temperatures for the entire 24-hour period of below freezing, ranging from a low of 10 to a high of 28. Exhibit 7-P for February 4, 1964, shows temperatures ranging from a low of 12 to a high of 34. The exhibit shows a reading of 34°F. recorded at 1:55 P.M. on February 4, 1964; that another reading of 34°F. was recorded at 2:56 P.M.; and that the readings of 12:55 P.M. and 3:55 P.M. were both 31°F. Exhibit 4-P shows a maximum temperature reached on February 4, 1964, at 2:15 P.M. of 36.4°F. The above shows that for the period of time from at least 1:55 P.M. to 2:56 P.M. on the 4th day of February, 1964, the temperatures were above freezing and that these were the only above-freezing tem-

peratures recorded for the entire period of time from February 3, 1964, past the time of the accident on February 5, 1964. Exhibit 6-P showed temperatures for February 5, ranging from a low of 17 to a high of 30, the high of 30°F. being recorded at 1:55 P.M., which was after the occurrence of the accident in question.

The recordings on all of the weather records discussed aforesaid were made at the Salt Lake City Airport. The conclusion from the weather records is inescapable that the patch of ice in question was in existence for a minimum time of from 3:55 P.M. on the day prior to the accident to and including the time of the accident, or close to 24 hours.

The evidence showed that plaintiff suffered injuries necessitating a total of $1,212.96, (Exhibit 1-P) in medical expenses, occasioned by a nerve root irritation consistent with a disc syndrome involving nerve roots at the 4th or 5th lumbar interspaces. (R. 115-144).

The case was submitted to the jury on special interrogatories given as instruction No. 28 (R. 62). The jury answered the first interrogatory:

"Was the defendant guilty of negligence?

"Answer: No."

As a result of this answer, the jury was not required to answer any of the additional interrogatories, and the court entered judgment thereon in favor of

defendant and against plaintiff, "No Cause of Action." (R. 67-68).

Plaintiff filed a motion for a new trial (R. 65) which was denied on January 10, 1966. (R. 66).

ARGUMENT

POINT I

INSTRUCTION NO. 9 CONSTITUTED A DIRECTED VERDICT AND VIOLATED THE RULE THAT A FORMULA INSTRUCTION MUST CONTAIN THE THEORIES OF ALL PARTIES.

Instruction No. 9 reads as follows:

> "If you find from a preponderance of the evidence that water or moisture had accumulated on the walkway because of melting snow or other natural conditions which became frozen into ice, and that its presence was not revealed because of newly fallen snow; and, if you believe that these conditions were the result of natural seasonal weather conditions, such accumulation or presence of ice would not constitute negligence on the part of defendant or his agents." (R. 43).

Instruction No. 9 was Defendant's Requested Instruction No. 5. (R. 20).

Defendant requested Instruction No. 5(a) (R. 33) to be given only in the event the court did not give Request No. 5, as follows:

"If you find from a preponderance of the evidence that ice and snow had accumulated on the walkway as the result of natural seasonal conditions, *and the defendant or his agents did not in the exercise of reasonable care have a reasonable opportunity to remove the snow prior to the time plaintiff fell and to discover the icy spot,* the defendant would not be negligent." (Italics ours).

The court gave Requested Instruction 5 and did not give Requested Instruction No. 5(a).

Instruction No. 9 constituted a directed verdict because admittedly the ice and snow in question were the result of natural seasonal weather conditions.

Plaintiff's theory was that the defendant was negligent in *failing to discover and remedy the ice condition.* Yet the court told the jury in Instruction No. 9 that if the ice resulted from natural seasonal weather conditions, its *presence* would not constitute negligence on the part of defendant. The very thing that plaintiff is complaining about is the unnecessary *presence* of the ice at the time of the fall. Its presence, whether the same could and should have been removed or not, is said by the court to *not* constitute negligence. This instruction eliminates entirely any duty whatsoever to inspect, discover, and remove accumulations of ice, *regardless of how long and how notorious the existence of same.* This simply cannot be the law. It negates the entire common law concept of duty to exercise ordinary care to discover and remove hazardous conditions that may

cause injury to invitees and tenants on a landlord's premises. What the trial court has done to the Restatement and to Harper and James by this instruction is somewhat shocking to say the least. The court doesn't say, "unless defendant had a reasonable opportunity to discover the ice and failed to exercise ordinary care to discover and remove same, in which event he would be negligent." *The court simply states that this defendant is not negligent if the ice accumulated as a result of nature's act, no matter how long it had remained and how clear the opportunity to remove same.*

Instruction No. 9 is objectionable for the additional reason that it is a "formula" instruction which fails to include the theory of plaintiff that defendant failed to exercise ordinary care to discover and remedy the dangerous condition. It should be obvious from a mere reading of the instruction that it is prejudicial error, inasmuch as it tells the jury if the condition of the ice was the result of natural seasonal weather conditions, defendant is not negligent, without calling to the jury's attention the fact that defendant has an affirmative duty to exercise reasonable care to make common walkways safe. This type of an error was contained in an instruction given by the trial court in the case of *Ivy v. Richardson,* (1959) 9 Utah 2d 5, 336 P.2d 781. This case dealt with a personal injury received by plaintiff from being hit by a car backing out of a driveway. The instruction in question in the *Ivy* case was:

"If you find from a preponderance of the evidence that the defendant failed to keep and maintain a proper lookout for the plaintiff in the driveway where the accident occurred and that such failure proximately resulted in the accident, then your verdict must be in favor of the plaintiff and against the defendant."

Concerning this instruction, the court stated at page 786:

"The above instruction, taken by itself, is in error because it fails to take into account the possible contributory negligence of the plaintiff. This kind of instruction, sometimes referred to as a 'formula instruction,' which makes a recital in accordance with the contention of a party and ends with the conclusion: ' * * * and if you so find, then your verdict must be for (the party)', is not generally a good type of instruction to give. This is so because it lends itself to the error just noted and also because it tends to be argumentative rather than to set out the principles of law applicable to the issues impartially as to both parties. For such reasons it is better to avoid giving instructions of that type. It is conceded that the issue of contributory negligence was propertly covered in the next instruction. This, however, pitted one instruction against the other and might have been confusing to the jury."

The *Ivy* case follows the well-recognized general rule of law as stated at 88 C.J.S., page 927, par. 351:

"The giving of an instruction directing a verdict if the jury should find specified facts are established is not error and is not improper as

directing a verdict. *However, an instruction directing a verdict if the jury should find specified facts are established, must include all the circumstances which must concur to warrant the verdict and the failure to include all of them is not cured by giving other instructions.*" (Italics ours).

A further statement covering this type of an instruction is contained at 89 C.J.S., TRIAL, Section 441, at page 37:

> "Where an instruction purports to sum up all the facts, the proof of which will warrant a verdict for a party, the instruction must be correct, and, if erroneous or incomplete, it is not susceptible of cure by any other instructions, unless such instruction properly refers to, and incorporates within its terms, other given instructions which properly submit such omitted elements. A binding, mandatory, or peremptory instruction, or one directing a verdict, if erroneous or incomplete, cannot be cured by any other instructions."

This rule is further elaborated on at 53 Am. Jur., TRIAL, par. 518, at page 459:

> "A judge, who may not indicate an opinion at any stage of the trial on an issuable fact, may not participate in the verdict by so declaring the law as to ignore or minimize legitimate contentions of fact of one party to the advantage of the other. Thus, an instruction which directs a jury to find for the plaintiff on certain facts stated therein is erroneous if it does not refer to facts that tend to show an affirmative defense."

Also see *Moore v. Turner,* 137 W. Va., 299, 71 S.E.2d 342, 32 A.L.R.2d 713; and *Hustad v. International Oil Company,* 52 Md. 343, 202 N.W. 814.

Defendant's Requested Instruction No. 5(a) shows that counsel for defendant realized the requirement of balancing instructions; however, the trial court failed to take note of this principle and gave the original request. Of course, plaintiff's theory was that the defendant was negligent in failing to discover and remedy a dangerous condition. The questioned instruction tells the jury that if they find that the condition was the result of natural seasonal accumulations of ice and snow, that defendant is not negligent. The jury in answering the first question had to follow the mandate given them in Instruction No. 9.

The error contained in Instruction No. 9 cannot be cured by other instructions. The case of ***Konold v. The Rio Grande Western Railroad Company,*** 21 Utah 379, 60 P. 1021, states:

> "Instructions on a material point in the case which are inconsistent or contradictory, should not be given. The giving of such instructions is error, and a sufficient ground of reversal because it is impossible after verdict to ascertain which instruction the jury followed, or what influence the erroneous instruction had in their deliberation. This has been so uniformly held that citations are unnecessary."

The error committed by Instruction No. 9 is compounded by Instruction No. 11, reading as follows:

"The defendant, as the owner of the premises, was not a guarantor against the occurrence of the accident in which the plaintiff sustained injury. If you find from the evidence that the defendant or his employees were unaware of the slippery condition which caused plaintiff to fall, and under the circumstances could not have reasonably anticipated the existence of said condition, then you must find the defendant was not negligent."

The vice of this instruction is emphasized when it is realized that the instruction is coupled with the introductory phrase that the defendant is not a guarantor against the occurrence of accidents and then goes on to state that if the defendant or his employees were unaware of the slippery condition, and under the circumstances could not have reasonably anticipated its existence, the defendant was not negligent.

The evidence shows that a person would have to anticipate the formation of ice on a sidewalk during a period of time when there existed temperatures for a time above freezing, followed by temperatures thereafter which were subfreezing. A person must know that when temperatures are above freezing, snow and ice melt; and when temperatures are subfreezing, water freezes. This instruction accentuates the error contained in Instruction No. 9 and is extremely prejudicial, inasmuch as it is slanted toward the defendant's theory and contains no balancing phrase showing the theory of the plaintiff, that the defendant as an apartment house owner has a duty of exercising reasonable care

to discover and correct dangerous conditions on common walkways.

POINT II

THE SUBMISSION OF UNAVOIDABLE ACCIDENT IN INSTRUCTION NO. 5 CONSTITUTED PREJUDICIAL ERROR TO PLAINTIFF.

Instruction No. 5 states as follows:

> "The law recognizes unavoidable accidents. An unavoidable accident is one which occurs in such a manner that it cannot justly be said to have been proximately caused by negligence as those terms are herein defined. In the event a party is damaged by an unavoidable accident, he has no right to recover, since the law requires that a person be injured by the fault or negligence of another as a prerequisite to any right to recover damages." (R. 39).

If defendant claims that unavoidable accident is a separate and affirmative defense, then certainly it should have been pleaded. Defendant made no such plea. The recent modern trend of authorities in this country has labeled unavoidable accident as an immaterial issue and prejudicial to plaintiffs. The reason for this has been that courts have realized the simple truth, that unavoidable accident is giving defendant an additional defense of nonnegligence to which he is not entitled. In the other instructions the court has explained to the jury the duty of the defendant toward

the plaintiff, and that if plaintiff fails to prove a violation of the duty proximately caused her injuries, then plaintiff cannot recover. It is prejudicial for the court to give defendant another arrow to his bow by instructing the jury on unavoidable accident as a separate defense. There is no such separate affirmative defense recognized by the general tort law.

In 1958 California repudiated a line of prior authority and clearly and definitely held that an instruction on unavoidable accident is error. This was done in the case of *Butigan v. Yellow Cab Company,* 49 Cal. 2d 652, 320 P.2d 500, 65 A.L.R.2d 1. This case involved a collision between the Yellow Cab and an automobile driven by the other defendant, when the cab going north attempted to turn, according to the cab driver, into a driveway of the other side of the street in order to turn around and proceed north. The cab driver claimed that as he was attempting to make this turn, his engine killed, and he became stalled and was then hit by the southbound automobile driven by the other defendant. The other defendant claimed that the cab suddenly came into his lane without any stopping or stalling. The court held that an instruction on unavoidable accident was reversible error. In so doing, the court discussed the history of the concept of unavoidable accident. The court stated at page 504:

> "In reality, the so-called defense of unavoidable accident has no legitimate place in our pleading. It appears to be an obsolete remnant from a time when damages for injuries to person or

property directly caused by a voluntary act of the defendant could be recovered in an action of trespass and when strict liability would be imposed unless the defendant proved that the injury was caused through 'inevitable accident.' Although exactly what was covered by this expression is not clear, it apparently included cases where the defendant was utterly without fault. 'Unavoidable accident' was then an affirmative defense to be pleaded and proved by the defendant. (See 2 Harper & James, The Law of Torts—1956, 747 et seq.; Prosser on Torts—2d Ed. 1955, 118).

"In the modern negligence action the plaintiff must prove that the injury complained of was proximately caused by the defendant's negligence, and the defendant under a general denial may show any circumstance which militates against his negligence or its causal effect. The so-called defense of inevitable accident is nothing more than a denial by the defendant of negligence, or a contention that his negligence, if any, was not the proximate cause of the injury * * * . The statement in the quoted instruction on 'unavoidable or inevitable accident' that these terms 'simply denote an accident that occurred without having been proximately caused by negligence' informs the jury that the question of unavoidability or inevitability of an accident arises only where the plaintiff fails to sustain his burden of proving that the defendant's negligence caused the accident. Since the ordinary instructions on negligence and proximate cause sufficiently show that the plaintiff must sustain his burden of proof on these issues in order to recover, the instruction on unavoidable accident serves no useful purpose. * * *

"The instruction is not only unnecessary, but it is also confusing. When the jurors are told 'in law we recognize what is termed an unavoidable or inevitable accident' they may get the impression that unavoidability is an issue to be decided and that, if proved, it constitutes a separate ground of nonliability of the defendant. Thus they may be misled as to the proper manner of determining liability, that is, solely on the basis of negligence and proximate causation. The rules concerning negligence and proximate causation which must be explained to the jury are in themselves complicated and difficult to understand. The further complication resulting from the unnecessary concept of unavoidability or inevitability and its problematic relation to negligence and proximate cause can lead only to misunderstanding."

The court went on to hold that the giving of the instruction was prejudicial.

Following the rationale of the ***Butigan*** case, the Oregon Supreme Court in 1964 held that the giving of an unavoidable accident instruction is error in the State of Oregon. See ***Fenton v. Aleshire,*** 238 Or. 24, 393 P.2d 217. This case involved what is commonly referred to as a "darting out" case, where an 8-year-old girl was hit by an automobile and killed. The Oregon Supreme Court states in part, at page 222:

"In the modern law of negligence the doctrine of 'unavoidable accident,' or, as it is sometimes called, 'inevitable' or 'pure' accident, is an anomaly. By definition—at least by the definition adopted by this court—it has no place as

a separate and independent element in an action based on negligence. As pointed out by Paul G. Rees, Jr., of the Arizona Bar, in a scholarly article entitled 'Unavoidable Accident—a Misunderstood Concept,' 'the Restatement of Torts does not treat unavoidable accident as an entity of the law,' 5 Ariz. Law Rev. 225, footnote 11, at 228. No instruction on unavoidable accident is included in the Uniform Jury Instructions in negligence cases drafted by the Committee on Procedure and Practice of the Oregon State Bar, and approved by the judges of the Circuit Court of Multnomah County on February 21, 1963. As this court has repeatedly declared, an unavoidable accident is nothing more nor less than an accident which occurs without anyone's fault. In practical effect, when included in the charge of the court to the jury, it is lagniappe to the defendant—not only because it is an added 'you-should-find-for-the-defendant' type of instruction, but because it may be misunderstood by the jury as constituting some sort of separate defense. By its very nature it has led this court—and we apprehend other courts—to regard the refusal to give the instruction as no ground for reversal, to attempt to delimit the type of cases to which it is applicable, to declare that even in those cases it is discretionary with the trial judge and to admonish caution in the use of the instruction. What is to guide the discretion of the judge in a particular case is by no means clear."

The court then refers to the *Butigan* case and states as follows on page 223:

"This reasoning is in full accord with what this court has said in numerous decisions, and

makes unavoidable the conclusion that instructions on unavoidable accidents in negligence cases are without value and may be prejudicial.

Following this line of authorities, the Supreme Court of Colorado, in 1964, in the case of ***Lewis, et al. v. Buckskin Joe's, Inc., et al.***, ... Col. ...., 396 P.2d 933, did away with unavoidable accident instructions in the State of Colorado. This case had to do with personal injuries caused by the overturning of a stagecoach which was a concession run on defendant's property. The court, following the line of authority of the *Butigan* and *Fenton* cases, stated at page 941:

> "This instruction should not have been given. Instructions on negligence and contributory negligence are sufficient and inclusive of so-called unavoidable accidents. To further instruct on unavoidable accident serves only to twice tell the jury that the plaintiff cannot recover unless he proves negligence.
>
> "Though this court has sanctioned the giving of instructions on unavoidable accident and, on occasion, held it to be reversible error to refuse to so instruct, we now determine that to give such instruction or to recognize unavoidable accident in an action based on negligence, as an independent element, separate and apart from negligence and contributory negligence, is improper."

And again at page 942:

> "We conclude that from and after announcement of this opinion an instruction on unavoidable accident should never be given; and, though

recognizing that accidents may be unavoidable, now go on record holding that a plea of unavoidable accident may not be set up as a separate or independent defense and that to now instruct on unavoidable accident is error. We expressly overrule previous announcements of this court to the contrary."

The clear trend of authorities toward condemnation of unavoidable accident instructions in automobile collision cases can be seen by examing an annotation following the *Butigan* case at 65 A.L.R. 2d page 12. See also the following: *Carlburg v. Wesley Hospital and Nurse Training School,* (1958), 182 Kan. 634, 323 P.2d 638; *Tyree v. Dunn,* (1957) .... Okl. ...., 315 P.2d 782; *Cohen v. Kaminetsky,* (1961), 36 N.J. 276, 176 A.2d 483; *Bennett v. McCready* (1960), 57 Wash. 2d 317, 356 P.2d 712; *Kreh v. Trinkle* (1959), 195 Kan. 329, 343 P.2d 213; *Whittaker v. Green* (1948), 191 Md. 712, 62 A.2d 630; *Leach v. Great Northern Railway Company* (1961), 139 Mont. 84, 360 P.2d 94; *Loser v. Sklar,* (1959), 357 Mich. 166, 97 N.W.2d 617.

The propensity for injecting confusion into the minds of the jurors by using the unavoidable accident instruction becomes apparent when we consider that to the layman, untutored in the technicalities of tort law, an accident is an unintended injury. Lawyers appreciate that unintended injuries may be subdivided into two kinds: 1. Unintended and nonnegligent, (for which in general and apart from situations to which strict liability attaches, there is no liability); and 2. Unintended and negligent, (giving rise to liability for

the tort of negligence). Considered in the foregoing light, it becomes apparent that the use of the very term "unavoidable accident" carries with it a very prejudicial connotation. The serious risk is that the jury will reason as follows:

> "The defendant didn't mean to injure the plaintiff; it was only an accidental injury, without design, deliberation, or intent; on this view of things, the judge has instructed us that our sworn duty is to find for the defense."

In speaking of the tendency of such an instruction to create confusion, the court stated in *Carlburg v. The Wesley Hospital & Nurse Training School* (1958), 182 Kan. 634, 323 P.2d 638, at page 641:

> "Generally speaking, when an accident is caused by negligence, there is no room for application of the doctrine of 'unavoidable accident,' even though the accident may have been 'inevitable' or 'unavoidable' at the time of its occurrence, and one is not entitled to the protection of the doctrine if his negligence has created, brought about, or failed to remedy a dangerous condition resulting in a situation where the accident is thus 'inevitable' or 'unavoidable' at the time of its occurrence. In other words, a person is liable for the combined consequences of an 'inevitable' or 'unavoidable' accident and his own negligence."

It can well be appreciated that the unavoidable accident instruction is prejudicial to the plaintiff when this instruction is considered in combination with Instructions 9 and 11. Instruction No. 9 has prepared

the groundwork by instructing the jury that defendant is not negligent if the ice resulted from natural seasonal weather conditions. Instruction No. 11 adds the concept that defendant is not a guarantor and not responsible if his employees did not or should not have known of the dangerous condition. In this context the court then instructs that defendant is not responsible for an unavoidable accident. It is obvious that from Instructions 9 and 11 the jury is directed that this was an unavoidable accident and then Instruction No. 5 instructs the jury that defendant is not responsible for unavoidable accidents. This combination of instructions most certainly constitutes a directed verdict for the defendant. No answer other than the answer given by the jury could result if the jury is to follow these instructions.

The instruction on unavoidable accident is extraneous to the issues and evidence of the case at bar, and it was prejudicial error for the court to give it. See *Moore v. Denver & Rio Grande Western RR. Co.* (1956), 4 U.2d 255, 292 P.2d 849; and *White v. Pinney* (1940), 99 U. 484, 108 P.2d 249, which hold that in Utah it is error to give instructions on extraneous issues even though they may be abstractly correct.

CONCLUSION

The jury could not have answered the interrogatory any other way under the instructions. Instructions Nos. 9 and 11 told the jury that if the ice condition resulted from natural seasonal weather condi-

tions, the defendant is not negligent; and further, that the defendant is not a guarantor against the occurrence of an accident. Instruction No. 11 further told the jury that if defendant's employees were unaware and under the circumstances could not have reasonably anticipated the existence of the ice, defendant is not responsible. In this situation the court delivered the crushing blow by instructing the jury that the law recognizes unavoidable accidents and that plaintiff cannot recover for an unavoidable accident.

These instructions constituted a directed verdict for defendant. Not only did the court deliver mandatory instructions purporting to cover the entire case without including plaintiff's theory, but the court also instructed on unavoidable accident, which was an extraneous matter and reversible error in and of itself.

With slanted, prejudicial, and erroneous instructions such as these, plaintiff did not receive a fair jury trial.

It is respectfully submitted that the judgment should be reversed and the case remanded for a new trial.

Respectfully submitted,

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